United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1589

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1589

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANUEL ALFONSO RODRIGUEZ, and
RAYMOND GERALDO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF
APPELLANT MANUEL ALFONSO RODRIGUEZ

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Table of Contents

Table of Cases

Table of Cases (Continued)

Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

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- v. - : Docket No. 76-1589

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- -X

REPLY BRIEF OF APPELLANT MANUEL ALFONSO RODRIGUEZ

point I

The Government presented false material evidence both to the Grand Jury and Petit Jury upon which Count 1 and Count 3 were based.

The Government conceded in its brief at pp. 14-15 the undeniable fact (App. Br. pp. 2-11) that the so-called "end use certificate", which was the basis for the indictment against the defendant under Count 1 and Count 3, was not signed by the defendant Rodriguez and thus, was false evidence.

The Government did not deny and it did not raise any

challenge to the facts that Miguel Celis purloined at least three blank sheets of paper from the Estado Mayor General de Las Fuerzas Armadas of the Republic of El Salvador bearing its alleged letterhead, brought those blank sheets of paper to the United States, and in the United States the said Miguel Celis forged the name of the defendant Rodriguez on at least three of those blank sheets of paper by tracing the signature of defendant Rodriguez thereon, and thereafter, in the United States, the said Miguel Celis, with others, to whom Miguel Celis represented that defendant Rodriguez had signed those blank sheets of paper, (App.pp. 78-81 SA) typed up, filled in, and prepared the so-called "end use certificates" in their various forms (App. Br. 2-11).

The Government's brief in its footnote on pp. 14-15 confessed that it knew prior to the return of the indictment on May 25, 1976, directly from Miguel Celis, that the defendant Rodriguez did not sign the "certificate dated April 22, 1976", which the indictment charged was a certificate "bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez" (underscoring added) as alleged in Count 1 of the indictment at Appendix p. 4A and as alleged in Count 3 of the indictment at Appendix 9A, to wit:

> "A certificate dated April 22, 1976 on the official letterhead of the 'Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, S.A.', bearing the signature of defendant Manuel Alfonso Rodriguez", (underscoring added)

by its disclosure that Miguel Celis testified to the Grand Jury. On May 26, 1976, at the time that Miguel Celis entered a plea of guilty to Count 3 of this indictment, he stated on the record that it was he that traced the signature of defendant Manuel Alfonso Rodriguez on the so-called end use certificate (GX 31). (App. Br. pp. 2-11).

The Government also confessed, in its brief at the footnote on pp. 14-15, that Miguel Celis testified to the Grand Jury which returned the indictment herein on May 25, 1976.

The Government did not deny it had been fully informed and that it had been fully cognizant since before the indictment was returned on May 25, 1976, of the fact that defendant Rodriguez did not sign the so-called end use certificate and that Miguel Celis had forged the "signature" of defendant Rodriguez by tracing it thereon, and that it was Celis and others, not defendant Rodriguez, who had filled in, typed up, and prepared the so-called "end use certificate". The Government knowingly and deliberately sought and obtained the indictment against defendant Rodriguez on the false evidence that he signed the so-called "end-use certificate" (App. 4A, 9A). The Government knowingly, deliberately, aggressively and intentionally sought and obtained the conviction of defendant Rodriguez on that false evidence (App. Br. pp. 2-11).

The Government has nonetheless persisted in a course of deliberate lack of candor, and of deliberate misrepresentation, even to this Court. Instead of owning up to its misconduct, the Government, instead, has adopted the tactic of bluffing and 'toughing' its way through, and of distorting, avoiding, and misrepresenting the facts in the case and the issues on this appeal.

At page 14 of its brief, the Government stated its answer to the serious charge made by the defendant Rodriguez that the Government sought and obtained the indictment of the defendant and aggressively sought and obtained his conviction on trial upon false evidence, to wit:

> "The claim that this prosecution was pursued under the false theory (sic) that Rodriguez actually signed the 'end use certificate' is directly contrary to the facts. Indeed, the United States Attorney expressly stated to both the District Court and defense counsel during the trial, on the record, that the Government did not claim that Rodriguez had personally signed the document." (Matter with double underscoring and parenthesis added; matter with single underscoring in the Government Brief).

The defendant Rodriguez charges that the prosecution was based upon and was "pursued under" false evidence; the Government's distortion and attempt to substitute the word "theory" for the word "evidence" is a puerile exercise which can fool no one. There is a substantial difference between

the word "evidence" and the word "theory". The defendant Rodriguez was indicted, tried and convicted upon <u>false evidence</u>, not merely upon a <u>false theory</u> (App. Br. pp. 2-11).

The Government's one shot statement which was made by the Chief Prosecutor in the privacy of the District Judge's robing room, was made only to the District Judge and defense counsel. It was not made to the jury (T. 255-257).

The trial transcript shows the following (T. 255-257):

> "(In the robing room).
>
> Mr. Hallinan: Are you going to claim that the Colonel physically signed this document?
>
> Mr. Fiske: I don't think we have to get to that.
>
> Mr. Hallinan: We do for any voir dire that I might have.
>
> The Court: Let me see it.
>
> Mr. Fiske: No, we are not going to claim that he signed it.
>
> Mr. Hallinan: Then, I have no objection.
>
> Mr. Fiske: Let's put it this way: we are not going to introduce any evidence that he physically signed it.
>
> The Court: Let's cut through all the niceties of going back and forth and asking the questions and not answering them.
>
> Mr. Fiske: A very simple question: What Mr. Hallinan basically wants to know is, are you going to introduce handwriting evidence to show that this handwriting, if it be handwriting, is the handwriting of the Colonel?

Mr. Hallinan: Or they are going to claim that because he denies that is his signature.

Mr. Fiske: Your Honor, we are not going to claim that Colonel Rodriguez himself wrote that signature on that piece of paper.

On the other hand, we are very definitely claiming that signature appears on that paper with the full authorization and knowledge of Colonel Rodriguez.

Mr. Hallinan: All right. I thought I understood that.

The Court: The reason he has a right to know about it now is whether he should call handwriting experts or scientific people.

.....

Mr. Fiske: We are all set. Just so we understand, this document can go in evidence?

Mr. Hallinan: I have no objection to that document.

The Court: Do you, Mr. Lang? It is a blank piece of paper ---

Mr. Hallinan: How are you going to describe it, with the name of Colonel Rodriguez?

Mr. Fiske: There has been nothing said as to whose name that is.

Mr. Lang: We will get a little cross-examination on it somewhere along the line.

Mr. Fiske: There has been testimony already. Mr. Geraldo said Mr. Rodriguez signed it. Mr. Geraldo said that at the meeting, and that is not what I am saying.

(In open court.)" (T.255-257).

The document to which the Chief Prosecutor was directing his remarks was not the completed so-called "end use

certificate", namely Government Exhibit 31 (App. 81SA), the document that the Chief Prosecutor was referring to and talking about was Government Exhibit 11 (App. 78 SA). Government Exhibit 11 was a letterhead blank sheet of paper on which was a "signature" (App. 78 SA). As to this sheet of paper, Government Exhibit 11, and the two other sheets of letterhead paper, one of which was introduced into evidence as the so-called "end use certificate", namely Government Exhibit 31, the Government had already elicited the testimony of Agent Kelly that

> "Colonel Rodriguez had signed the document" (T. 254).

Agent Kelly testified that Miguel Celis said to him on May 2, 1976 at the Peppertree Restaurant, that defendant Rodriguez had signed those blank letterhead sheets of paper, to wit:

> "....he removed from a folder he was carrying, three blank letters which had formal letterheads from El Salvador and which at the bottom of the page was signed with a signature (T. 253) .... They explained that Colonel Rodriguez had signed the document...." (T. 254) (Underscoring added). Also, (Appendix 84-86SA)

So far as the jury was concerned, the prosecutor's remark was never made. So far as the jury was concerned, the indictment charged that the defendant Rodriguez had signed the end use certificate. The prosecutor in his opening statement so declared, the testimony adduced by the prosecutor from its

evidence was the same, the prosecutor's closing statements were the same, and the District Judge's charge to the jury was to the same effect. (Rodriguez Br. pp. 2-11). As shown by the trial transcript and the brief of and by defendant Rodriguez, that one instance, in the robing room remark, by the prosecutor, was not candid and was not made in good faith (T. 257). (Rodriguez Br. pp. 5, 6).

The robing room statement of Mr. Fiske shows that it was made out of slyness and with a lack of good faith because the prosecutor carefully stated that

> "... that is not what I am saying...."
> (T. 257) (Underscore supplied).

but that it was being said that defendant Rodriguez had signed the "end use certificate", GX 31, and GX 11, and GX 15 by others (T.257), namely Government Agent Kelly who testified to the hearsay statements of Miguel Celis and Raymond Geraldo (T.251, 253, 254, 266, 267, 271, 272, 298, 299, 300, 486, 571, 584-585, 607, 609).

The fact is that the prosecutor did so claim at the trial to the jury that the defendant Rodriguez signed the end use certificate, in all of its forms (App. Br. pp. 2-11). The trial transcript is abundantly clear on that fact and the Government cannot dissimulate its way out of that trial transcript and all it something else. (T.6-30). Mr. Fiske repeatedly stated in his opening statement to the

jury that the "end use certificate" was signed by defendant Rodriguez (Trial Transcript, pp. 6-30). The Government aggressively elicited testimony at trial that the "end use certificates" were signed by defendant Rodriguez (Trial Transcript, pp. 266, 267, 271, 272, 298, 299, 300, 486, 571, 584, 585, 607-609). The Chief Prosecutor argued to the trial court in opposition to motions to dismiss, that the "end use certificate" was signed by defendant Rodriguez (Trial Transcript, pp. 715-719). The Chief Prosecutor submitted Jury Charge Request No. 29 to the trial court, which expressly stated that the 'end use certificate' was a document "bearing the signature of Manuel Alfonso Rodriguez". That Government Request No. 29 provided as follows:

> "REQUEST NO. 29
> Substantive Counts: First Element
>
> The first element the Government must prove beyond a reasonable doubt is that on or about May 5, 1976, the defendants made, facilitated or caused to be made certain statements. With respect to Count Two, the statement which the Government contends was made is Government's Exhibit 30, a Form DSP-5, 'Application/License' for the export of the 10,000 submachine guns. With respect to Count Three, the statement which the Government contends was made is Government's Exhibit 31, an 'end-user' certificate, typed in Spanish and bearing the signature of Manuel Alfonso Rodriguez. With respect to Count Four, the statement which the Government contends was made is Government's Exhibit 32, a purchase order from San Pan Trading Corporation to Mott Haven Truck Parts, Inc." (Underscoring added).

In his closing statement, the Government prosecutor again

repeated to the jury that the "end use certificate" was signed by defendant Rodriguez. (Trial Transcript, pp. 740, 741, 742, 744, 745, 748, 749, 752, 753, 759, 762, 765, 766, 834, 846).

On one single short occasion before the trial jury, the Chief Prosecutor stated in his closing statement:

> "As to the substantive count, Count 3, the end use certificate which Mr. Celis and Mr. Geraldo brought up from El Salvador on May 2nd, there is no proof (sic) in this case that Colonel Rodriguez actually signed that document. We are not contending in the absence of that proof that he actually did in fact sign it...." (Trial Transcript, p. 764). (Matter in parenthesis added).

The facts show, on the contrary, that the prosecutor was contending in the indictment and throughout the trial before the jury that defendant, Rodriguez, signed the end use certificate (App. BR. 2-11). The jury had no other view of the evidence.

In the footnote at pp. 14-15 of its brief, the Government argued that

> "It was also made clear, at the same time, however, that the Government did claim that the signature had been placed on the 'end use certificate' with Rodriguez' full knowledge and authorization (Tr.256). The good faith basis for that claim is contained in the grand jury testimony of Miguel Celis, which was submitted, sealed, to Judge Duffy in response to a post trial motion -- denied by Judge Duffy -- raising these same objections." (Double underscoring added).

The indictment charged that the end use certificate bore "the signature of Colonel Manuel Alfonso Rodriguez." It did not charge that his "signature" (a contradiction in terms) was "placed on the end use certificate with Rodriguez' full knowledge and consent" (G. Br. fn. pp. 14-15). The case was not charged, prosecuted or tried on that theory or claim of fact. The jury was not charged to return a verdict of guilty on that theory. There was no evidence whatever to support such a theory and the prosecution has not pointed to any.

The undenied facts are totally contrary to such a theory. If the defendant Rodriguez had "authorized" he could so easily have signed those papers. If the defendant Rodriguez had "authorized" Miguel Celis to sign his name thereto, why was it necessary for Miguel Celis to purloin the blank letterhead sheets of paper, and why was it necessary for Miguel Celis to forge the defendant Rodriguez' signature on those sheets of paper by tracing his signature thereon. Those acts are inconsistent with "authorization."

The Government indicted, prosecuted, tried and convicted defendant Rodriguez on material false evidence, knowingly and deliberately.

The utter bankruptcy and bad faith of the Government is exposed somewhat by its arugment at pp. 14-15 of its brief to the defendant's charge that the indictment was based on material false evidence, to wit:

"that neither appellant raised it during the trial proceeding as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure..."

and that

"It is the settled law in this Circuit as well as in the Supreme Court of the United States, that ....'an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence'...."

Does the Government actually believe an indictment based on false evidence is within the rule stated and that the Government can seek and obtain an indictment based on false evidence with impunity?

Point II

The Government violated the rule of Brady v. Maryland.

The Government, for all of its twists and turns, cannot escape from the inescapable fact that it knew before May 25, 1976 when the Grand Jury returned this indictment, that the defendant Rodriguez did not sign the end use certificate and that in the United States Miguel Celis had forged the name of defendant Rodriguez on those end use certificates by tracing his signature thereon, and in the United States had filled in, typed up and prepared the end use certificate. The

Chief prosecutor, in his arguments to the trial court in opposition to defendant's motions to dismiss that count, ~~se~~ stated:

> "As to Count 3, your Honor, ... there the document that is the subject, is the document with which Colonel Rodriguez is directly linked..." (Trial Transcript, pp. 717-718). (Underscoring added).

The Government had a clear duty to disclose this very material, essential, exculpatory evidence and deliberately did not do so. Brady v. Maryland, 373 U.S. 83 (1963). Its attempts to argue that the trial counsel

> "had been informed that the signature had been placed on the document by someone else" (G. Br. fn. p. 15)

is a distortion. The trial counsel, in the robing room, stated the defendant Rodriguez denied that it was his signature (T 256). The natural conclusion is that someone else must have done so. This knowledge by trial counsel, however, is in no regard a satisfaction of the clear duty of the prosecution to disclose the material exculpatory evidence that the prosecution had that Miguel Celis had forged the "signature" of defendant Rodriguez on the end use certificate by tracing his "signature" on the same.

> "Appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness and therefore the validity of the

proceedings, and relief either on a motion for a new trial, or for habeas corpus, may not depend on whether more able, diligent, or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party or the one with greater resources to be the winner." Lewin v. Katzenbach, 363 F. 2d 287, 291 (D.C. Cir. 1966).

The United States Supreme Court, in Viereck v. United States, 318 U.S. 236, 248 (1942) quoted the following:

"'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629.'"

Point III

There was no evidence to prove the conspiracy charged and the defendant was convicted upon a charge not made.

The indictment purported to charge a conspiracy to

violate the Gun Control Act of 1968 (App. 1A-7A), specifying Title 26 United States Code Section 5811, 5812, 5861(d) and (e) (Title II of the Gun Control Act of 1968) (App. 3A). While the indictment also recited 18 U.S.C. Sections 1001 and 2, there were no facts set forth alleging a conspiracy to violate 18 U.S.C. Sections 1001 and 2 (See App. Br. pp. 57).

The testimony at the trial established that there was only <u>one</u> machine gun in existence of the type that was test-fired by Government Agent Kelly; that no guns were manufactured; and that the manufacturer never even ordered a single item of material to "prepare" for "production" of any of those phantom sub-machine guns, to wit:

> "Q. Mr. Kelly, if I recall your testimony there was a time in this matter that you went to North Carolina to test-fire a weapon, is that right?
>
> A. Yes, sir. (Trial Transcript, p. 442).
>
> .....
>
> Q. Do you recall, Agent Kelly, what the serial number of that gun was?
>
> A. I believe so, sir.
>
> Q. Could you tell me?
>
> A. I believe it was 200439. (Trial Transcript, p. 443).
>
> .....
>
> A. .... Their factory is in Bangor, Maine..." (Trial Transcript, p. 443).
>
> .....

A. Gwin told me that the gun we test-fired in North Carolina was a prototype, there was only one fully automatic machine gun of that type in the world, and that he had the gun up in Bangor, Maine, and that it was available to us whenever we wanted it.

We called Gwin and we made arrangements to pick it up and an agent flew up to Maine. Gwin delivered the gun to him and it was brought down and placed in the evidence room in the White Plains ATF evidence locker." (Trial Transcript, p. 444).

.....

(TT 658) "Mack William Gwin, Jr., called as a witness by the Government, being first duly sworn, testified as follows:

.....

Q. How are you presently employed?

A. I am the president-owner of Gwin Firearms.

Q. Where is Gwin Firearms located?

A. Just outside of Bangor, Maine.

Q. How long have they been in business?

A. Three years.

Q. What is the business of Gwin Firearms?

A. We manufacture Bushmaster pistols and submachine guns.

Q. How long have you been manufacturing this line of weapons?

A. Approximately a year and a half (Trial Transcript, page 658).

.....

(TT 680) Q. Did you go into production at any point on the Bushmaster for this order?

A. No, we did not.

Q. Did you order any material for this order? (TT 680).

(TT 681):

A. We didn't order the material .....
Nothing was actually done until a contract was firmed up.

Q. How much was the gun being sold for?

A. On this particular sale? .... I don't know. I didn't get into negotiations on that ....." (TT 681).

The Government witness Gwin testified that he would not sell any weapon to anyone who was not a licensed dealer, licensed by the Federal Government, in which the transfer is approved by the Federal Government:

"The Court: .... Okay, what do you do?

The Witness: To transfer an automatic weapon, sir?

The Court: Yes.

The Witness: We sell our automatic weapons only to dealers who are licensed by the Federal Government, and each transfer, the paperwork on the weapon, has to go to Washington, and it is approved in Washington and then the transfer is effected. ...

Q. ..... What procedures are necessary to transfer such a weapon from your manufacturing plant to a foreign country?

.....

A. On a foreign sale, we are required to submit to Washington to the State Department, Office of Munition Control, the State Department Form 5, an end user certificate, and a copy of the order.

Until there is approval, there is no sale. .... (TT 663-664).

.....

Q. Upon the transfer of a firearm domestically within this country, is any tax imposed on that transfer?

A. Not to a class 3 dealer, to a licensed automatic weapons dealer is a tax exempt transfer. If that dealer sells the weapon to a private individual, there is a $200 registration tax.

Q. That is a tax imposed upon the transfer of each individual weapon? (TT 665)

A. That is correct." (TT 666)

The application for the export license for firearms was made by Mott Haven Truck Parts, Inc., as evidenced by Government Exhibit 18 (TT 278) (Also TT 595-8).

Government Agent Kelly testified that Mott Haven Trucks Parts, Inc. was licensed to import and to export firearms, to wit:

"Q. Were you aware at that time that they had a license to import and export firearms?

.....

A. At that specific meeting, no sir, but later I found out that they did." (TT 398)

At the trial, Government Agent Kelly's testimony disproved the gun conspiracy charge; i.e., a conspiracy to sell guns to persons in the United States:

(TT 395):

"A. .... We inferred that these guns were destined for another country... (TT 395)

.....

A. I don't believe there was any mention of specific countries, but I am not positive of that fact.

Q. How about at other times?

A. We never specified any country that we were sending these guns to. (TT 395-396)

.....

Q. Didn't he (Stagg) indicate that he had already presold these Bushmasters and that they had to be the items in this transaction?

A. .... You are correct, this initial deal was specifically the Bushmasters and they already had been sold"(TT 436-437)

.....

Mr. Fiske, in his arguments to the Trial Court in opposition to defendant's motion to dismiss Count 1 of the indictment asserted that the "independent evidence" of the defendant's participation in the conspiracy was derived from "his conduct" at the Hilton Inn, interrogation on May 15, 1976 and from the (illegal) post-arrest statement (Tr. 714, 717).

Even that illegal videotape interrogation of defendant Rodriguez disproved the so-called gun conspiracy:

"Well, to start with, the problem of the machine guns is yours. ...." (App. 111-112 SA)

Mr. Fiske, in his arguments to the Trial Court showed that the Government had failed to prove the so-called gun conspiracy:

> "Mr. Fiske: Secondly, your Honor, we think that in the allocution, on a plea by Messrs. Alvarez, Michaelson and Cagianese, each of them said, in pleading guilty to a false statement count, that they did not think the guns were going to be sold to buyers in the United States, they thought the guns were to be sold to buyers in some place other than El Salvador and I think it was agreed at that time that that was sufficient to make them guilty under the false statements counts and I think we are entitled to that kind of a charge, that it isn't necessary to find that they actually thought the guns were going to be sold to buyers in the United States as long as they knew the guns were not going to be sold to the Government of El Salvador..." (Tr. 731-732). (Underscoring added).

The prosecutor argued for and sought from the trial court instructions to the jury, that the jury could return a verdict of guilty on Count 1 of the indictment on a basis other than as charged in the indictment, to wit:

> "That it isn't necessary to find that they actually thought the guns were going to be sold to buyers in the United States as long as they knew the guns were not going to be sold to the Government of El Salvador." (Tr. 731, 732)

United States v. Bertolotti, 529 F. 2d 149,159 (2d Cir. 1975) holds otherwise. The prosecutor argued that the conspiracy count set forth two objectives, rather than the single objective which the indictment charged, and that the

> "Government is entitled to have them told, first of all, that it is not necessary that they find

that defendants conspired to do both; if they conspired to do either one of those it is enough" (Tr. 731).

The Trial Court apparently agreed with the prosecutor in his view of the indictment:

> "The conspiracy charge has two basic objectives. I will be going through the elements of filing a false statement. That is part of the conspiracy charge. It is part of the substantive charge.
>
> There is another object of the conspiracy, however, and that is a violation of the Gun Control Act. I am a little bit chary about going into the whole question of gun control and particularly gun control where we are dealing with supposedly 10,000 sub-machine guns to be sold to various and sundry people in the United States or possibly to be sold" (Tr. 730). (Underscoring added).

The Trial Court instructed the jury as to two statutes, the Gun Control Act and 18 U.S.C. Section 1001 (Tr. 868).

The Trial Court then clearly instructed the jury that it could convict the defendants

> "if you find the defendants conspired to commit acts which if done would have violated either one of these statutes.... In order to convict the defendants it is not necessary that you find that they conspired to violate both sections" (Tr. 869, also Tr. 875). (Underscoring added).

As set forth above, there was no evidence that any of the defendants had any belief, knowledge or intent that the "guns" were "to be sold to various and sundry people in the

United States." Those defendants were informed by Government Agent Kelly and his cohorts, and they believed that the "guns" had already been "sold" to another foreign government (T.436-7).

United States v. Bertolotti, 529 F. 2d 149, 159 (2d Cir. 1975) shows that the proof of intent on a conspiracy charge must be specific intent to violate the specific substantive law, not merely commission of acts which violate the law. The Trial Court's jury instructions were plain error. Those instructions allowed the jury to convict upon the basis of that false evidence, which it may fairly be said, they did, since there was no evidence of any sale of any gun to anyone from anyone within the United States, and no evidence of intent or agreement by any defendant to do so, as shown above.

Point IV

The Government violated defendant Rodriguez' constitutional rights under the Fourth, Fifth and Sixth Amendments by the custodial, focused, secret government interrogation of defendant.

The Government has actually argued that because it did not disclose to the defendant, that he was being subjected to a planned, intensive, secret, focused, custodial interrogation by Government agents, acting through and on the advice and counsel of the United States Attorney for the Southern

District of New York and one or more of his assistants who were then and there fully marshalled and arrayed against him for the purpose of incriminating him in crime, (App. Br. pp. 45-53), that the defendant Rodriguez had no Fourth, Fifth, or Sixth Amendment rights (G. Br. pp. 20-22):

> "A fortiori, where, as here, the suspect is not even aware that he is in the presence of law enforcement officers, Miranda is not applicable."

Miranda stands for no such proposition and it is to the contrary. Also, Haley v. Ohio, 332 U.S. 596, 615 (1948); Katz v. United States, 389 U.S. 347, 353 (1960); United States v. Ash, 413 U.S. 300, 311 (1973). Constitutional rights do not fall away so easily. The defendant Rodriguez was entitled to counsel at the time of the illegal government hotel interrogation, particularly in view of the fact that the Government prosecutors were already arrayed against him. This Court, in United States v. Bennett, 409 F. 2d 888, 900 (2d Cir. 1969) held:

> "... Counsel is rather to be provided to prevent the defendant himself from falling into traps devised by lawyers on the other side and to see to it that all available defenses are proferred...."

Point V

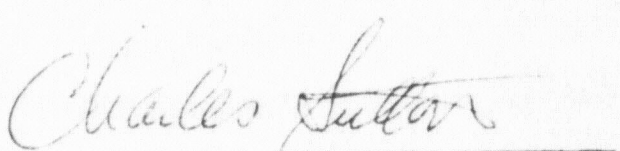
The defendant was deprived of his Fifth and Sixth Amendment rights by the ineffective assistance of counsel

With regard to ineffective assistance of counsel, it is notable that the Government, when it suited its purpose, argued that defendant did not have certain rights on appeal because no objections were made by trial counsel at trial. (G. Br. pp. 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35). The recitation of trial counsel's ineffectiveness in the brief of defendant Rodriguez at pp. 10-44 clearly establishes that fact, measured by any standard.

Conclusion

The judgment should be reversed and the indictment should be dismissed.

Respectfully submitted,



Charles Sutton

Dated: April 1, 1977

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